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VO THANH TAY & ORS v. MALAYSIAN MARITIME ENFORCEMENT AGENCY

HIGH COURT SABAH & SARAWAK, BINTULU
DUNCAN SIKODOL JC
[CRIMINAL APPEAL CASE NO: BTU-42S-1-1-2020]
B 13 MARCH 2020

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused persons pleaded guilty and convicted for offence of entering Malaysian fisheries waters without notifying name, flag State, location, route and destination* C *of vessel, types and amount of fish it was carrying and circumstances under which it was entering Malaysian fisheries waters – Master of vessel fined RM150,000, in default three months' imprisonment – Crew members fined RM25,000 each, in default one month imprisonment – Whether appeal in compliance with ss. 305 and 307 of Criminal Procedure Code – Whether appeal defective and incompetent –* D *Whether notice of appeal valid – Whether ought to be struck out*

FISHERIES: *Fisheries Act 1985 – Section 16(3) – Accused persons pleaded guilty and convicted for offence of entering Malaysian fisheries waters without notifying name, flag State, location, route and destination of vessel, types and amount of fish it was carrying and circumstances under which it was entering Malaysian fisheries* E *waters – Master of vessel fined RM150,000, in default three months' imprisonment – Crew members fined RM25,000 each, in default one month imprisonment – Sessions Court Judge ordered accused persons to pay RM70,000 being cost of holding vessel in accordance with s. 51 of Fisheries Act 1985 – Whether imposition of holding charge correct in law – Whether holding charge recoverable only as debt by* F *way of civil proceedings – Whether s. 51 offence per se where fine to be imposed upon conviction of accused persons*

The appellants in the present appeal were charged at the Sessions Court, under s. 16(3) of the Fisheries Act 1985 ('Act') read together with s. 24(1) of the same, for the offence of entering Malaysian fisheries waters for the G purpose mentioned in s. 16(1) without notifying by radio, telex or facsimile in the English or Malay language an authorised officer of the name, the flag State, location, route and destination of the vessel, the types and amount of fish it was carrying and of the circumstances under which it was entering Malaysian fisheries waters. The appellants pleaded guilty and were H accordingly convicted and sentenced. The first appellant, who was the master of the vessel, was fined RM150,000, in default three months' imprisonment. The second to 17th appellants, who were the crew members, were sentenced to a fine of RM25,000 each, in default one month imprisonment. The Sessions Court Judge ('SCJ') also ordered that (i) the vessel and its equipment I and appliances be returned to the rightful owner after the lapse of the appeal period; (ii) the proceeds of the sale of the fish be forfeited to the Government

of Malaysia; (iii) RM70,000 be paid to the respondent, being costs of holding the vessel in accordance with s. 51 of the Act; and (iv) all the appellants be referred to the Immigration Department for further action after paying the fine or serving the default sentence. Hence, the present appeal by all 17 appellants against their conviction and sentence. The respondent raised a preliminary objection that the appeal by the appellants was defective, incompetent and ought to be struck out as the same did not comply with ss. 305 and 307 of the Criminal Procedure Code ('CPC') as (i) under s. 305 of the CPC, when an accused has pleaded guilty, there shall be no appeal except as to the extent or legality of the sentence; and (ii) the notice of appeal filed by the appellants was defective as it made no mention of the costs of holding the vessel under s. 51 of the Act when such appeal, essentially, was against the order of costs. As such, by virtue of s. 307 of the CPC, the appeal should be disallowed as the appeal was deemed to have been withdrawn. In response to the respondent's preliminary objection on the appellant's failure to comply with s. 307 of the CPC, the appellant argued that (i) there was no requirement for the exact orders or sentence imposed by the court to be specified in the notice of appeal; (ii) there was no requirement in the CPC for a notice of appeal to be in a particular form as compared to a petition of appeal which provides the use of Form 51. As such, the general words used in s. 307(1) of the CPC were therefore sufficient to be stated in the notice of appeal without stating the exact sentence.

Held (allowing appeal in part):

(1) The appellants clearly stated that they were appealing against both the conviction and sentence imposed by the SCJ. The failure on the part of the appellants to specifically state the extent or legality of the sentence imposed by the SCJ did not make the notice of appeal invalid. By virtue of s. 307 of the CPC, there was no requirement for the exact orders or sentence to be specified in the notice of appeal. Section 307(1) of the CPC only requires a person dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against that judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or of the alleged inadequacy of any sentence. Furthermore, there was no requirement in the CPC for a notice of appeal to be in a particular form as compared to a petition of appeal which provides the use of Form 51. In the circumstances, the preliminary objection raised by the respondent in respect of the appellant's failure to comply with s. 307(1) of the CPC was dismissed. (paras 14 & 15)

(2) In so far as the objection on s. 305 was concerned, the notes of proceedings revealed that the procedure under s. 173(a) and (b) of the CPC has been complied with by the SCJ during the hearing of the appeal and that the SCJ's sentence was in accordance with the law in that the

charge against the appellants was read and explained to them in the Vietnamese language and all of them understood the charge before they pleaded guilty. Upon being satisfied that all the appellants understood the nature and consequences of their plea and admitted without qualification the offence alleged against them, only then the SCJ proceeded to sentence them after giving them the opportunity to mitigate. Additionally, during the plea and sentencing, they were at all times represented by counsel. (para 16)

(3) The imposition of the holding charge in the sum of RM70,000 by the SCJ, pursuant to s. 51 of the Act, was wrong in law as she was not empowered under s. 51 to make such an order. Although the Act is a piece of legislation which is penal in nature, the said holding charge is recoverable only as a debt by way of civil proceedings. Section 51 of the Act clearly states that, in the event of the accused being found guilty of the offence, the costs of holding the vessel shall be a debt to the Government of Malaysia jointly and severally by the licensee, the permit holder, the owner and the master of the vessel and shall be recoverable accordingly. Section 51 is not an offence *per se* where a fine is to be imposed upon the conviction of the accused persons. The imposition of the costs of holding fees under this section is the legal consequence in the event of the accused being found guilty. Upon being so found, the accused jointly and severally must make payment for such holding costs, it being a debt due to the Government of Malaysia. These are manifestly civil in nature where the Fisheries Department are empowered to recover and demand the debt due and payable to the Government of Malaysia from the accused. Furthermore, s. 51 does not provide the court with the powers to impose a fine and/or, as in this case, to grant an order to pay the debt recoverable by the Government as opposed to prosecution costs under s. 426(1) of the CPC referred to by the respondent because s. 426(1) of the CPC specifically provides that the court can make such an order while in s. 51, none is provided. (paras 18 & 21-23)

(4) The decision to pay the RM70,000 being costs of holding the vessel was set aside. If it was already paid, the payment was to be returned to the appellants. The fine and the imprisonment term in default of payment of fine imposed by the SCJ remained. (para 24)

Case(s) referred to:

Cheah Sin Choon v. Tan Lye Hock [2017] 1 LNS 1103 CA ***(refd)***
Danh Coi & Ors v. PP [2017] 1 CLJ 464 HC ***(refd)***
Lee Weng Tuck & Anor v. PP [1989] 2 CLJ 120; [1989] 1 CLJ (Rep) 75 SC ***(refd)***
Liew Sung Yong v. PP [2013] 2 CLJ 1089 HC ***(refd)***
Lim Kim Wei v. PP [2019] 10 CLJ 297 CA ***(refd)***

PP v. Azizan Salleh & Other Cases [1983] 2 CLJ 95; [1983] CLJ (Rep) 714 HC ***(refd)***
PP v. Muhammad Kasyfullah Kassim [2017] 1 CLJ 63 CA ***(refd)***
Tan Sri Dato' Seri Vincent Tan Chee Yioun & Anor v. Jan De Nul (Malaysia) Sdn Bhd & Anor And Another Appeal [2019] 1 CLJ 19 FC ***(refd)***
Tang Hee Hing v. PP [1991] 2 CLJ 916; [1991] 1 CLJ (Rep) 447 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(a), (b), 305, 307(1), 426(1), (5)
Fisheries Act 1985, ss. 16(3), 24(1), 25(a), 51

For the appellants - Ranbir Singh Sangha; M/s Ranbir S Sangha & Co Advocs And Solicitors
For the respondent - Yong Ann Nee; Malaysian Maritime Enforcement Agency

Reported by Najib Tamby

JUDGMENT

Duncan Sikodol JC:

[1] This is an appeal by all 17 appellants against the conviction and sentence imposed by the learned Sessions Court Judge Bintulu on 28 January 2020 for an offence under s. 16(3) of the Fisheries Act 1985 FA read together with s. 24(1) of the FA and punishable under s. 25(a) of the same.

[2] The charge preferred against the appellants in respect of this appeal read as follows:

> Bahawa kamu pada 18 Ogos 2019 jam lebih kurang 0454 pagi, di atas vesel penangkapan ikan bernombor Bakun 3 di kedudukan garis lintang 04° 47.847" Utara dan garis bujur 111° 47.412' Timur pada jarak 114.0 batu nautika dari daratan terhampir Balingian, Sarawak di perairan perikanan Malaysia, didapati telah memasuki perairan perikanan Malaysia bagi maksud yang tersebut dalam subseksyen 16(1), tanpa memberitahu seorang pegawai diberi kuasa melalui radio, teleks atau faksimili dalam bahasa Inggeris atau Melayu tentang nama, Negara bendera, lokasi, jalan dan destinasi vesel itu, jenis dan amaun ikan yang dibawanya dan tentang keadaannya ia memasuki perairan perikanan Malaysia. Oleh itu, kamu telah melakukan suatu kesalahan di bawah subseksyen 16(3) Akta Perikanan 1985 [Akta 317] dibaca bersama subseksyen 24(1) Akta yang sama dan boleh dihukum dibawah perenggan 25(a) Akta yang sama.

[3] All the 17 appellants pleaded guilty to the charge and sentenced as follows:

(i) The master of the vessel who is the first accused was fined RM150,000 in default, three months imprisonment.

(ii) The second to the 17th accused, who are the crew members were sentenced to a fine of RM25,000 each in default 1 month imprisonment.

[4] The learned Sessions Judge also made the following order:

(i) That exh. P9, the vessel and its equipment and appliances to be returned to the rightful owner after the lapse of the appeal period.

(ii) The proceeds of sale of the fishes (exh. P8) to be forfeited to the Government of Malaysia.

(iii) That the sum of RM70,000 be paid to MMEA Bintulu Sarawak being cost of holding the vessel in accordance with s. 51 of the Fisheries Act 1985.

(iv) All the accused are to be referred to the immigration department for further action after paying the fine or after serving the default sentence.

All the accused persons being dissatisfied with the conviction and sentence, hence this appeal.

Preliminary Objection By The Respondent

[5] At the outset of this appeal, the prosecution had on 17 February 2020 filed a notice of preliminary objection (PO) against the appeal filed by the 17 appellants.

[6] The crux of the respondent's preliminary objections are that the appeal by the appellants is defective and incompetent and ought to be struck out as the same does not comply with ss. 305 and 307 of the Criminal Procedure Code (CPC).

[7] It is the learned DPP's submission that under s. 305 of the CPC, when an accused person has pleaded guilty, there shall be no appeal except as to the extent or legality of the sentence (see *PP v. Muhammad Kasyfullah Kassim* [2017] 1 CLJ 63). See also *Danh Coi & Ors v. PP* [2017] 1 CLJ 464. It is the respondent's contention that the Sessions Court Judge is not duty bound to explain the nature and consequences of s. 51 of the FA to the accused persons as they were not charged under the said section. It is the respondent's contention that s. 51 is akin to prosecution cost.

[8] In addition, learned DPP also submitted that the notice of appeal filed by the appellants is defective as it made no mention of the cost of holding the vessel under s. 51 of the FA when such appeal essentially is against the order of cost. As such, by virtue of s. 307 of the CPC, this appeal should also be accordingly disallowed as the appeal is deemed to have been withdrawn (see *Lim Kim Wei v. PP* [2019] 10 CLJ 297). See also *Liew Sung Yong v. PP* [2013] 2 CLJ 1089.

Appellant's contention

[9] In reply, the appellants argued that in the case of *PP v. Muhammad Kasyfullah Kassim* [2017] 1 CLJ 63, the plea of guilt was unequivocal and the nature and consequences were properly explained unlike in the present case whereby the holding charge of RM70,000 was not explained.

[10] And in respect of the respondent's preliminary objection on the appellants' failure to comply with s. 307 of the CPC, learned counsel submitted that there is no requirement for the exact orders or sentence imposed by the court to be specified in the notice of appeal. It was also further argued by learned counsel that there is no requirement in the CPC for a notice of appeal to be in a particular form as compared to a petition of appeal which provides the use of "Form 51". As such, the general words used in s. 307(1) of the CPC are therefore sufficient to be stated in the notice of appeal without stating the exact sentence.

The Law

[11] Section 173 of the CPC provides that in summary trials, the following procedure shall be observed:

> (a) When the accused appears or is brought before the court, a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried.
>
> (b) If the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he may be convicted on it and the court shall pass sentence according to law:
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> Provided that before a plea of guilty is recorded the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

[12] Therefore, all that the Sessions Court Judge in a summary trial is required to do under s. 173(a) and (b) is to explain the charge, the sentence, that there would be no trial, that there will be no appeal against conviction if a guilty plea is taken. See *Tang Hee Hing v. PP* [1991] 2 CLJ 916; [1991] 1 CLJ (Rep) 447. See also *Lee Weng Tuck & Anor v. PP* [1989] 2 CLJ 120; [1989] 1 CLJ (Rep) 75; [1989] 2 MLJ 143.

[13] In a case where a person who after conviction and sentence is dissatisfied with the sentence or order pronounced by the court, s. 307(1) of the CPC provides as follows:

> [1] Except in any case to which section 304 applies and subject to sections 305 and 306 *any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against that judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or of the alleged inadequacy of any sentence by lodging*, within fourteen days from the time of the judgment, sentence or order being passed or made, *with the clerk of the Magistrate's Court a notice of appeal in triplicate addressed to the High Court* and by paying at the same time the prescribed appeal fee.
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> (emphasis added)

In *PP v. Azizan Salleh & Other Cases* [1983] 2 CLJ 95; [1983] CLJ (Rep) 714; [1985] 2 MLJ 116, Ajaib Singh J held that:

> **It is a well-established practice in such cases to merely state in the notice of appeal that the appeal is against sentence without mentioning whether it is as to the extent or legality of the sentence**. There has been no difficulty over this practice and there is no valid reason to denounce this practice as unacceptable. It cannot be denied that a clear form of notice specifying exactly what is appealed against would be desirable but I am of the view that the omission to so specify and merely to say in the notice of appeal that it is against sentence does not make the notice invalid.
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> (emphasis added)

Decision Of The Court

[14] Upon perusing the notice of appeal filed by the appellants, this court is satisfied that the appellants did state clearly in the notice that they are appealing against both the conviction and sentence imposed by the learned Sessions Court Judge. Based on the decision of Ajaib Singh J in *PP v. Azizan Salleh* (*supra*), I find that the failure on the part of the appellants in this current appeal to specifically state the extent or legality of the sentence imposed by the said learned Sessions Court Judge does not make the notice of appeal, invalid. I am in agreement with learned counsel for the appellants that by virtue of s. 307 of the CPC, there is no requirement for the exact orders or sentence to be specified in the notice of appeal. Section 307(1) of the CPC only requires a person dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against that judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or of the alleged inadequacy of any sentence. Furthermore, there is no requirement in the CPC for a notice of appeal to be in a particular form as compared to a petition of appeal which provides the use of "Form 51".

[15] In the circumstances, I dismiss the preliminary objection raised by the respondent in respect of the appellants' failure to comply with s. 307(1) of the CPC.

[16] In so far as the objection on s. 305 of the CPC is concerned, a perusal of the notes of proceedings revealed that the procedure under s. 173(a) and (b) of the CPC has been fully complied with by the learned Sessions Court Judge during the hearing of this current appeal and that the sentence imposed by Her Honour was in accordance to the law in that the charge against the appellants was read and explained to them in Vietnamese language and all of them understood the charge before they pleaded guilty. Upon being satisfied that all the appellants understood the nature and consequences of their plea and admitted without qualification the offence alleged against

them, only then the learned Sessions Court Judge proceeded to sentence them after giving them the opportunity to mitigate. Additionally, during the plea and sentencing, they were at all times represented by counsel.

[17] Although the holding charge of RM70,000 pursuant to s. 51 of the FA was not explained by the learned Sessions Court Judge to the appellants as alleged, this court is of the view that such failure does not affect the legality of the appellants' plea as the learned Sessions Court Judge is not duty bound under s. 173(a) and (b) of the CPC to explain the nature and consequences of s. 51 as the said s. 51 was not the offence with which the appellants/ accused were charged.

[18] However, I am in agreement with learned counsel's submission that the imposition of the holding charge in the sum of RM70,000 by the learned Sessions Court Judge pursuant to s. 51 of the FA is wrong in law as Her Honour is not empowered under s. 51 of the FA to make such an order. In my view, though the Fisheries Act 1985 is a piece of legislation which is penal in nature, the said holding charge is recoverable only as a debt by way of civil proceedings. For easy reference, s. 51 provides as follows:

> Where any vessel, vehicle, article or thing is held in the custody of the Government of Malaysia pending completion of any proceedings in respect of an offence under this Act, the costs of holding the vessel, vehicle, article of thing in custody shall, in the event of any person being found guilty of the offence, be a debt due to the Government of Malaysia jointly and severally by the licensee, the permit holder, the owner, and the master of the vessel, and shall be recoverable accordingly.

[19] In the recent Court of Appeal decision in *Cheah Sin Choon v. Tan Lye Hock* [2017] 1 LNS 1103 at para. 37, Nallini Pathmanathan JCA (as Her Ladyship then was) observed referring to an lndian case:

> In the Indian case of Secretary to Government, *Punjab v. Jagar Singh* [1977] Rev LR 104, AIR 1977, PH 114, the Learned Judge DS Lamba J at para 12 stated as follows:
>
> > It is well settled that in interpreting a statute, it is not competent for a Court to add words to a statute nor subtract any word from it. The Court must place due meaning upon every word thereof without straining the language in any way. The plain duty of the Court is to gather the intention of the Legislature from the words used in the statute. The Courts can depart from this rule only in rare and exceptional cases where the plain meaning of the words used would lead to absurd conclusions or would be destructive of the very purpose for which the Legislation sought to be interpreted happens to be enacted

[20] In *Tan Sri Dato' Seri Vincent Tan Chee Yioun & Anor v. Jan De Nul (Malaysia) Sdn Bhd & Anor And Another Appeal* [2019] 1 CLJ 19 at p. 37, Azahar Mohamed FCJ delivering the judgment of the Federal Court stated clearly that:

> ... An important statutory interpretation that is applicable here is that court cannot read or add words into a statute (see *Husli Mok v. Superintendent of Lands and Surveys & Anor* [2014] 9 CLJ 733. As judges, we are not entitled to read words into a statute unless clear reason for it is to be found in the statute itself (see *Low Huat Cheng & Anor v. Rozdenil Toni & Another Appeal* [2017] 3 CLJ 257.

[21] From a plain reading of the language of s. 51, it clearly states that in the event of the accused being found guilty of the offence, the cost of holding the vessel shall be a debt to the Government of Malaysia jointly and severally by the licensee, the permit holder, the owner, and the master of the vessel, and shall be recoverable accordingly.

[22] By that, it is my considered opinion that s. 51 is not an offence *per se* where a fine is to be imposed upon conviction of the accused persons. The imposition of the cost of holding fees under this section is the legal consequences in the event of the accused being found guilty. Upon being so found, the accused jointly and severally must make payment for such holding cost, it being a debt due to the Government of Malaysia. These are manifestly civil in nature where the Fisheries Department are empowered to recover and demand the debt due and payable to the Government of Malaysia from the accused.

[23] Further, I also find that s. 51 does not provide the court with powers to impose a fine and/or as in this case, to grant an order to pay the debt recoverable by the Government as opposed to prosecution cost under s. 426(1) of the CPC referred to by the respondent because in s. 426(1) of the CPC, it specifically provides that the court can make such an order whereas in s. 51, none is provided. For ease of reference, the said section is hereby reproduced:

> Section 426(1)
>
> The Court before which an accused is convicted of an offence:
>
> (a) In its discretion, may **make an order** for the payment by the convicted accused of the cost of his prosecution or any part thereof as may be agreed by the public prosecutor; or
>
> ...
>
> Section 426(5)
>
> ... **every order** made under this section by a Magistrate shall be appealable to the High Court.
>
> (emphasis added)

[24] In the premises, I allow the appeal and set aside the decision to pay the RM70,000 being cost of holding the vessel and if it is already paid, to be returned to accused persons. The fine and the imprisonment term in default of payment of fine imposed by the learned Sessions Court Judge remains as I do not find any reason to disturb/interfere such order.